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FILED
FEB 3 1902
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

A Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the Action No. 925 in said Court.

H. BISBEE,
GEORGE C. BEDELL,
Attorneys for Petitioner.

In the Supreme Court of the United States.

In re. Petition of L. Bucki & Son Lumber Company, a Corporation, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in case No. 925 in that Court.

Comes now the petitioner, L. Bucki & Son Lumber Company, by H. Bisbee and George C. Bedell, Esqs., its attorneys, and presents its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in the cause No. 925 in said Court, praying reference to a complete Transcript of the Record in the said cause, and eleven copies thereof filed with the Clerk of this Honorable Court on a petition of Fidelity and Deposit Company for certiorari to said United States Circuit Court of Appeals, granted by this Honorable Court on the twentieth day of January, 1902, with briefs in support of the said petition, and thereupon moves this Honorable Court for leave to file the said petition, and for the writ of certiorari as prayed for therein.

H. BISBEE,
GEORGE C. BEDELL,
Attorneys for L. Bucki & Son Lumber Co.

NOTICE.

The attorneys for Fidelity and Deposit Company, defendant in said cause are hereby notified that the above motion will be made and said petition presented on Monday the 3rd day of February, 1902, or as soon thereafter as the said motion can be submitted.

H. BISBEE,
GEORGE C. BEDELL,
Attorneys for L. Bucki & Son Lumber Co.

Service of the foregoing notice and receipt of copy of petition and motion acknowledged. R. H. LIGGETT,
Attorney for Fidelity and Deposit Co.

January 25, 1902.

To the Honorable the Justices of the Supreme Court of the United States:

A Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the Action No. 925, in said Court.	Petition for a Writ of Certiorari.

The L. Bucki & Son Lumber Company respectfully shows, that on the 21st of January, 1902, this Honorable Court, on the petition of the Fidelity and Deposit Company, of Maryland, the defendant in the said action, granted a writ of certiorari to said United States Circuit Court of Appeals. To the granting of the said writ, your petitioner made no opposition.

Second.

That the said action was brought, by your petitioner as plaintiff against the said defendant, to recover damages on its liability as a surety upon two bonds, given to obtain two writs of attachments at the suit of The Atlantic Lumber Company against your petitioner.

The conditions of the said bonds were in the language of, and according to the requirements of Section 1646, of the Revised Statutes of Florida, in the words and figures following, to-wit: "Bond.—No attachment shall issue until the person applying for the same, his agent, or attorney, shall enter into bond, with at least two good and sufficient sureties payable to the defendant in at least double the debt or sum demanded. *Conditioned to pay all costs and damages which the defendant may sustain in conse-*

quence of the plaintiffs' improperly sueing out said attachment."

See condition of the bonds. Record No. 925, pp. 5 and 10. [A subsequent statute makes a surety on the bond sufficient.]

Third.

The said writs were issued as auxiliary writs, in two common-law actions, instituted on the 1st day of October, 1897; in the first of which actions the plaintiff therein laid its damages at $15,000, based on a claim for the price of logs sold and delivered, under a written contract. The second action, on the same day, claimed $200,000 unliquidated damages, and based on the theory of profits expected to be made by the plaintiffs therein, by performing the unexpired period of the said contract, which was three and a half years; and on the theory that your petitioner, the defendant in said actions, had breached the said contract. Personal service of summons was made in both of said common-law actions.

Fourth.

Said writs of attachment were for the amounts, respectively, of $9,980.80, and of $75,000, and were levied upon your petitioner's mill plant, with a capacity of about 80,000,000 feet of lumber per year, and which cost about $150,000, and were levied upon about 5,000,000 feet of manufactured timber *and lumber* in its yards, and on 3,000,000 feet of logs in your petitioner's boom pens, and all the other property of petitioner in Florida.

See returns of Sheriff, Record, p. 56.

Fifth.

That each of the said writs of attachment were dissolved on your petitioner's motion, thereby establishing that they were "*improperly* issued," and thereby establish-

ing that the said surety was liable in damages on its said bonds. The important if not the only principal question in the trial of your petitioner's action against said surety upon the said bonds, was, *what were the* elements of damages, for which the said surety was liable, upon the terms and conditions of the said bonds, whereby the said surety *covenanted to pay all costs* and damages which the defendant (in said attachment) may sustain "*in consequence of improperly sueing out said attachments.*"

See Bonds and Revised Statutes aforesaid.

The only defense was the plea of non-damificatur.

Sixth.

Your petitioner avers that, in and by the said petition by the said surety, for the writ of certiorari granted as aforesaid, it presented but *one alleged error* of the said Circuit Court of Appeals *to its* prejudice, to-wit: That, under the conditions of the said bonds, fixed by the said statute, the said surety was not liable to pay as damages reasonable attorney's fees, incurred for the service of obtaining the dissolution of the said attachments, whereas said Court of Appeals ruled the said surety was liable for such damages.

But, your petitioner avers that, in the trial of the said action in the Circuit Court, and on assignments of error in the said Appellate Court, on exceptions duly taken to the several alleged erroneous rulings of the said Circuit Court, your petitioner contended and insisted that the said Circuit Court had made several erroneous rulings to your petitioner's prejudice, in respect of the measure of and elements of damages, *other than the said attorneys' fees*, whereby your petitioner's just recovery was largely reduced. And the said Appellate Court, by the rendition of its judgment, overruled said assignments of error.

Seventh.

Your petitioners avers that, by the very condition of the said bonds, the said surety was bound *to pay consequential damages*, and the measure of its damages was the same as the plaintiff's in attachment, to-wit: "All costs and damages *in consequence* of improperly issuing the said writs.

That at the trial of the said action the trial judge admitted evidence establishing, or tending to establish, that *in consequence* of the levy of the said attachments amounting to about $85,000 *upon all of the said properties* including lumber and logs on hand, of the value of at least $80,000, *constituting petitioner's entire stock* in *trade*, *and constituting all its means of buying logs and continuing its business*, your petitioner was unable to continue and was prevented from continuing to do any business whatever, for the period of *twenty months and upwards*, *for which period of time plaintiff in attachments maintained the lien of the said attachments by the levy thereof*, and by writs of error from the said judgments dissolving the said attachments and by writs of error from the final judgments in the said common-law actions, and by applying to this Honorable Court for a writ of certiorari, which was denied.

Eighth.

Your petitioner avers that, at the said trial, the said trial judge admitted evidence establishing, or tending to establish, that, if the said writs had not been levied upon all its properties aforesaid, your petitioner would have been able to continue in business at a large profit, and admitted the books of your petitioner, establishing that for the period of *nine months prior* to October 17, 1897, the date of such attachments, petitioner *had made in its business a net profit* of about $5,000 per month for each of the said nine months.

Ninth.

Your petitioner avers that, at the trial aforesaid, evidence was admitted establishing, or tending to establish, that *in consequence* of the levy of the said writs upon all its properties aforesaid, and preserving the lien thereof, as aforesaid, for the twenty months aforesaid and upwards, your petitioner was unable to obtain any means, money or credit, by reason of the ownership of the said large properties, so levied upon as aforesaid, while said lien remained thereon, whereby to continue to conduct its business as a manufacturer of lumber and timber, and whereby *the use* of its said mill properties, for the said twenty months and upwards, *was wholly lost to your petitioner*, all of which appears of record in the bill of exceptions in No. 925, p. 79 et seq.

Tenth.

Your petitioner avers that, at the close of the adducing of testimony, in the said action on the said bonds, on motion of the said surety company, the said trial judge *excluded from the consideration of the jury, all of the aforesaid evidence* adduced upon the points aforesaid, and ruled and decided that he would not submit, and did not submit to the jury the question of any damages sustained by petitioner in consequence of the said attachments *in respect to loss of profits as aforesaid*, or in respect to *damages for the loss of the use of its said mill properties or in respect to inability to obtain means, money, or credit to continue in business while* the lien of the said attachments was pending, except during the period of time from October 1st to October 11, 1897. *All of which appears in the said bill of exceptions in the said Record No. 925*, pp. 112 to 115, inclusive, setting forth *the said motion to exclude such evidence and the order of* the trial judge thereon, and the reasons of the judge for such order.

To all of which rulings of the said trial judge, petitioner duly excepted and assigned errors thereon. And

your petitioner requested numerous instructions to submit all such questions and elements of damages to the jury, which instructions were refused, and to such refusals your petitioner duly assigned errors on the ground that each was a proper element of damages, and that to take such questions from the jury, was an invasion of your petitioner's constitutional right of trial by jury.

See assignments of error, Nos. 1, 2, 3, 4. Record, p. 32 to 34.

Nos. 8, 9, 10 and 11. Record p. 36 to 39.

Eleventh.

And after argument of counsel to the jury, the said trial judge, upon his own motion, further charged the jury as follows, to-wit:

"All these questions that have come up in regard to the damages; *all this testimony that has come in to awaken your sympathies in behalf of one or the other, is not for you to consider;* the only question is a clear cut question; it is how much damages did the Bucki Company suffer. This question becomes more difficult by reason of facts and circumstances attending the writs of attachment. At the time the writs of attachment were levied, there were two common law suits commenced, both of which have been terminated. That is one attending circumstance. The other is that of The Atlantic Lumber Compay cancelled its contract, or considered it cancelled. That is The Atlantic Lumber Company refused and ceased to deliver any more logs to the Bucki Company. *So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs and the common law suits unite in being the cause for subsequent suffering of damage by the Bucki Company.*

"The law is distinct that where a party sets in motion a wrong an intervening wrong will not prevent the party instituting or setting in force that wrong from being liable for all damages which can be directly traced to that.

"But in this case the attachment did not cause the stopping of the furnishing of logs, nor did the issuing of the attachment cause the institution of the common law suits. I therefore say that it is difficult for you to determine how much damage the Bucki Company suffered by reason of the issuing of the attachments; not how much they suffered by reason of all the attending circumstances, but how much they suffered by reason of the issuing of the attachments.

"If there is any question upon which the Court considers a verdict would not be justified in any way in which it might be viewed then it is the duty of the Court to withdraw from the jury that question.

"As I say, that law is that all damages that can be awarded against a surety on the bond where there is no malice alleged, where a party merely becomes responsible for the *direct damages that have been caused, the damages must be strict and positive.*

"Taking into consideration the several causes, contemporaneous tending to interfere with the business of the Bucki Company, tending to injure their credit or break up their business, I was satisfied from the evidence that there could be no positive, certain or direct damages which could be charged to the issue of the attachments as separate and distinct from the other causes in this case.

"I have therefore as you have seen in the course of the case granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all profits the Bucki Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit. As I say, there was so much uncertainty, that there was no certainty under the law for determining what damages have been suffered by the party in this case. I therefore instruct you, gentlemen, that the damage must be confined to the damages suffered by the detention of

the mill for the time being. Those damages that have arisen by the detention of and taking the mill properties from the possession of the plaintiff. To the giving of which charge the plaintiff duly excepted on the ground that plaintiff was thereby deprived of his right to trial by jury, and other grounds."

Record, p. 131.

See pages 129, 130, 131, and assignments of error thereon.

No. 24 Record, p. 33 to 36, and your petitioner avers that the said trial judge subsequently explained what he meant by detention of the mill property from petitioner's possession, which explanation was that the plaintiff, by and with the consent of the sheriff, resumed sawing on October 7th, 1897, and continued to saw until all the logs in the boom levied on were cut, the lien of the attachment to be upon the manufactured product of such logs, in lieu of the logs themselves, and that the said logs were all sawn by November 16th, 1897, and the said judge explained that he meant to instruct the jury to allow damages as profits from the 1st to the 11th of October, *only because* the logs in the boom were seized under the attachment, and *during that time* plaintiff was prevented from operating its mill. But after the 11th of October the surety was not liable to damages for any interruption of business, *because such damages were too remote*. And Judge Shelby ruled that the surety was not liable to damages for interruption of business, even from October 1st to October 11th.

See Judge Shelby's opinion, Record 158, and not afterwards.

See Record, p. 19, near top.

Twelfth.

Your petitioner respectfully submits that by the fifth paragraph of Section 6, *creating* the said Circuit Court of Appeals, it was intended by Congress that whenever this

Honorable Court should by certiorari cause any case to be certified for its "*review and determination*, the Court should decide all questions of law essential to the disposition of the case upon their merits, if a decision of all such questions is seasonably applied for.

Thirteenth.

Your petitioner respectfully submits that there is as much, if not greater, conflict in the decisions of the inferior Federal Courts and State Courts in respect to the liability of a surety or surety company, upon attachments issued under statutes similar to those of Florida, for damages for the loss of the use of property of the defendant in attachment; and for damages by way of loss of profits by interruption or obstruction of business, and for damages for loss of credit, as a direct or consequential result of such attachments as there is conflict in respect to such surety's liability for attorney's fees incurred, in obtaining a dissolution of such attachments, on interlocutory motions, and that an authoritative declaration of this Honorable Court upon the questions of liabilities of surety companies in respect to the former damage is as of great importance to sureties and attachment debtors as it is in respect to attorney's fees.

Your petitioner avers that among the judges of the lower courts there was a direct conflict of opinion on questions of damages *other than those of attorney's fees*, in this Court; that two of the judges of the Appellate Court sustained the trial judge *upon all questions presented, except attorney's fees;* while the third, Judge Shelly, so far differed from the trial judge that he wrote an opinion in favor of reversing the entire judgment.

As explained in this petition, the trial judge ruled that the surety was liable to damages for interruption of business *from October 1st, 1897, the date of the levy of the writs, to October 11th of that year.*

Fourteenth.

Your petitioner submits as a further reason why the prayer of this petition should be granted, that, in the event this Honorable Court should find reasons upon the assignments of error by the said The Fidelity and Deposit Company to reverse the entire judgment in this action and direct a new trial, it is important and for the interest of both parties and the public that all questions of law arising upon the assignments of error by your petitioner, should be ruled and declared by this Court not only to guide the trial judge in such new trial, but to inform the public as to the measure of damages to which such surety companies will hereafter be liable in such and like cases. Wherefore, the premises being considered, and inasmuch as the Transcript of the Record of said cause is already in the possession of this, the Supreme Court of the United States, upon the petition of the said The Fidelity and Deposit Company of Maryland, your petitioner prays that a writ of certiorari may issue to review the said cause upon this petition, or that in lieu thereof this Honorable Court may be pleased by its order hereon to authorize your petitioner to file assignments of error in said court upon the said rulings of the said Circuit Court, and of the said Circuit Court of Appeals, and that your petitioner may be heard thereon upon the trial of this cause as fully as if the writ of certiorari had been granted on this petition, and your petitioner will ever pray, etc.

THE L. BUCKI & SON LUMBER CO.
By H. BISBEE,
Counsel for Petitioner.

H. BISBEE,
GEORGE C. BEDELL,
Of Counsel for Petitioner.

STATE OF FLORIDA, }
DUVAL COUNTY. } ss.

Personally appeared before me Horatio Bisbee, to me well known, who, being sworn, says on oath that he is the attorney for the above-named petitioner; that no officer thereof familiar with the facts of the said petition is now in the State of Florida, and that affiant is familiar therewith, and that the facts in the said petition stated are substantially true, as stated.

H. BISBEE.

Subscribed and sworn to before me this ..... day of .....1902.

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No. 513
FILED
FEB 3 1902
JAMES H. McKENNEY
By. of Bisbee & Bedell for Pet.
Filed Feb. 6, 1902.

In the Supreme Court

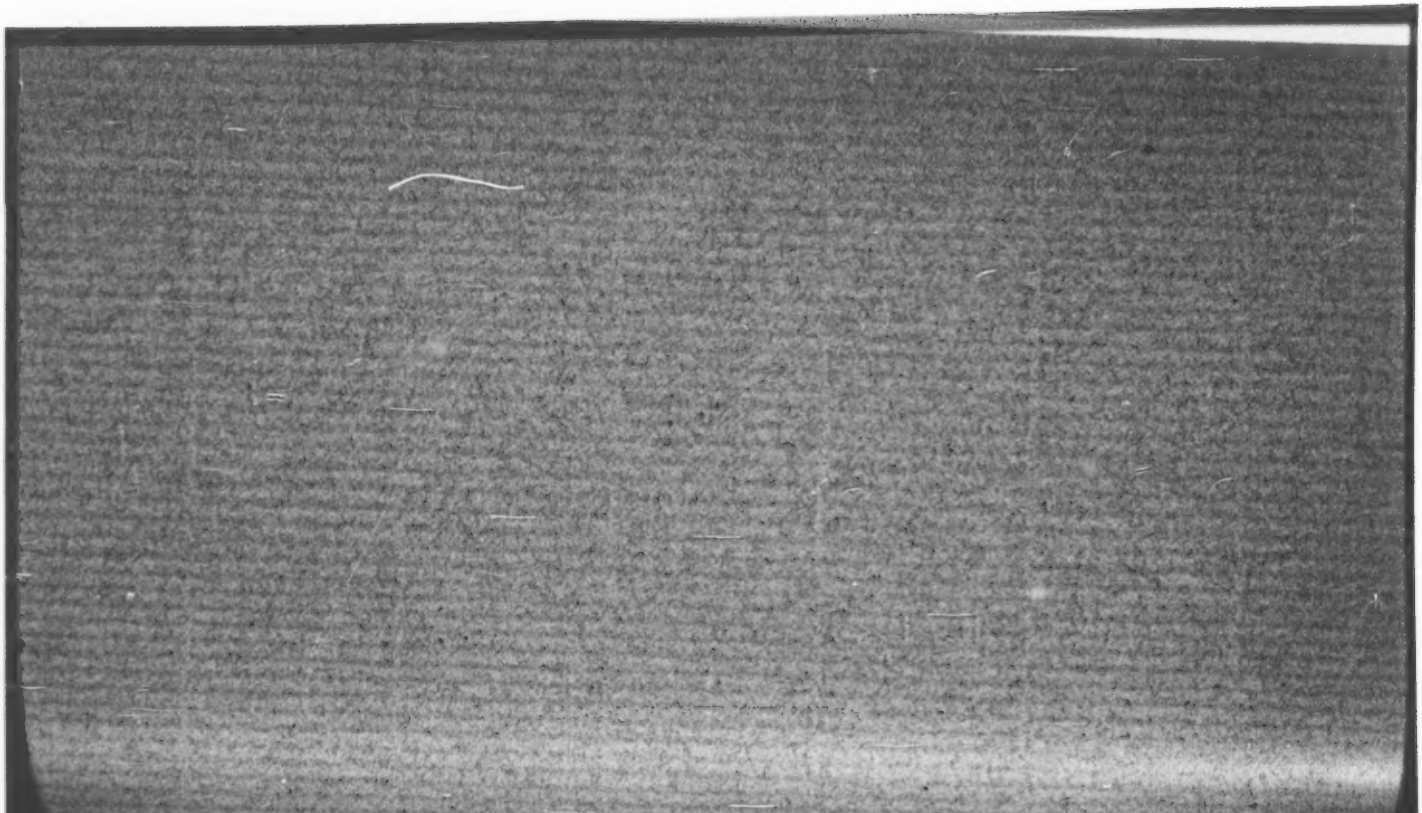
United States.

In Re Petition of the L. Bucki & Son Lumber Company for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit. In No. 925, of that Court.

BRIEF IN SUPPORT OF THE PETITION.

H. BISBEE, ESQ.,
GEORGE C. BEDELL, ESQ.,
Counsel for Petitioner.

1902.
PRESS OF THE H. S. PH. E. BREW COMPANY,
JACKSONVILLE, FLA.



In the Supreme Court of the United States.

In Re Petition of The L. Bucki & Son Lumber Company for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit. In No. 925, of that Court.

BRIEF IN SUPPORT OF THE PETITION.

This Court having granted a Writ of Certiorari on the Petition of The Fidelity and Deposit Company of Maryland, the defendant in this action, the plaintiff, The L. Bucki & Son Lumber Company, petitions for a like writ, or some order by which it can be heard on assignment of errors, alleged to be to its prejudice. Without such an order your petitioner can not be heard upon its assignment of errors.

Hubbard vs. Tod, 171 U. S., 474.

The suit was *for breach of contracts. The contracts were bonds, wherein the defendant Surety Company covenanted* "to well and truly pay all costs and damages which The L. Bucki & Son Lumber Company *may sustain in consequence of it*—the said Atlantic Lumber Company *improperly suing out said attachment.*"

The attachments were dissolved on motion of plaintiff, and the properties levied on ordered to be

returned to it. See judgments dissolving the attachments, Rec. No. 925, pp. 59-61.

There is no exception to the rule of law, that upon the dissolution of the attachments the plaintiff in attachment and the surety on its bond become liable to same damages. The surety is liable to the same measure of damages as the attaching creditor in the absence of ~~notice.~~ *malice.*

The question upon which there is a conflict of authority is, *what are the elements of damages in such cases?*

Points of Law.

Upon this petition it is, we think, only incumbent upon petitioner to establish a *prima facie right* to be heard upon its own assignment of errors, because there was a writ of error and *a cross writ of error* to review the judgment of the Circuit Court, and both were heard together in the Appellate Court as one case.

To establish such *prima facie* case we rely upon the following points :

(A) That this Court can better understand and have a clearer comprehension of the questions of law raised by the assignments of error by the defendant, by hearing argument upon assignments of error claimed to be prejudicial to the plaintiff.

(B) That, in view of the event that this Court may reverse the entire judgment and order a new trial, it is proper and expedient that all questions of law drawn into dispute should be finally decided, in order to conclude the trial judge on questions of law on such new trial, in the interest of preventing further litigation between the parties, and in the interest of the public that litigation cease.

(D) That there is such a conflict of authority in the Federal and State Courts in respect to the liability

of a surety upon an attachment bond (like those in this suit) for damages arising from *interruption of business and to credit in consequence of such writs of attachment*, and upon other elements of damages, that an authoritative decision by this Honorable Court would be *of general public importance*, not only to sureties and surety companies (which of late years have taken the place of natural persons), but to creditors and debtors throughout the United States.

(E) The *case at bar* illustrates the importance of these questions in this: that if the attaching *creditor and surety are not liable for damages for the interruption of the business, or injury to credit, of the attachment debtor, it follows that if* the facts are such that such alleged debtor can not sustain an action *for malicious prosecution; then*, though as held in this case, there was no ground for the attachments, the *plaintiff here must bear without recompense* the loss of the profits of its business, a loss of the use of its extensive mill plants for twenty months and upwards, amounting to at least $100,000.

(F) In the case at bar the trial Judge refused to submit to the jury *the question of the amount of damages sustained in consequence of the writs of attachments, because the attaching creditor—the Atlantic Lumber Company—contemporaneously with such writs brought common law actions*, and *contemporaneously* refused to deliver to plaintiff any more *logs under its unexpired contract* binding it to deliver 2,000,000 feet of logs, board measure, per month, for the further period of three and one-half years. And such refusal to submit to the jury was placed by the trial Judge on the *distinct ground* that it *was impracticable* for the jury to determine *how much damage such writs caused separate and apart* from the damage caused by such common law suits and by the refusal to deliver any

more logs, consequently plaintiff was entitled to no damages. The learned trial Judge treated the two last causes *as contemporaneous, contributory causes* of damage, with the writs of attachment. Such ruling of the Court was made without request by defendant, and without opportunity of plaintiff's counsel to argue such question.

Thus plaintiff's right of trial by jury was invaded. See Record, p. 129, last part p. 130.

It is submitted that this presents a *question of gravity and of great public interest in like cases.*

Points of Law and Authorities.

In Dushone vs. Benedict, 120 U.S., 630, it was held that on a breach of contract of sale of rags, *to be clean and free from infection*, and suitable to be used by the buyer as a manufacturer of paper, such manufacturer could recover damages for *interruption of his business* and loss of custom in consequence of smallpox being communicated to his employees from such rags.

That case was reversed because the trial judge *took the case from the jury on the ground that the testimony was too indefinite and uncertain* upon which to base a verdict. Id., 647.

In that case the seller of the rags had not covenanted expressly to pay *consequential damages*, but this Court held him liable to such damages as a *result of his breach of warranty.*

In the case at bar the defendant expressly *covenanted* to pay "*all* costs and damages the L. Bucki & Son Lumber Company *may sustain in consequence of it*—the said Atlantic Lumber Company—improperly *suing out said attachments.*" Rec. No. 925, p. 5.

Here, then, defendant *expressly covenants to pay consequential damages.*

In the case of the "Conqueror," 166 U. S., 110, this

Court held the Collector of the port, for seizure of the steamer (no element of malice being present) was liable for "the value of her use to the owner while detained, and the loss of the use of the steamer was a proper measure of damages, and that the books of her owner, showing her earnings prior to the detention, are admissible to show *probable future earnings.*

There was no element of malice in that case, but it was rested on the ground of an *innocent, illegal seizure,* depriving the owner of the use of his property.

Nor was there any *contract* that the Collector, as innocent trespasser, *would pay consequential damages.*

In Anvil Mining Company vs. Humble, 153 U. S., 540–550, this Court held that on *breach of a mining contract,* the party committing the breach, *preventing performance,* was liable to the other for *expected profits,* though there *was considerable uncertainty* as to the quantity of *ore remaining in the mine.* Id., 550.

Certainly it is a general rule—though there are conflicting decisions—that a party preventing the other from *performing a contract* is liable to damages for interrupting an *established business,* because such damages may be reasonably inferred to have *been in contemplation* of the party committing *the breach.*

On principle, how can the case at bar be distinguished? Here, the surety covenants to pay *consequential damages.*

Trespasses.

As soon as the attachment is dissolved, the attaching creditor becomes a trespasser for all acts done while the writ was in force.

28 New York, 66.

86 Fed., 223.

Hondley vs. Chadwick, 109 Ala., 505; S. C., 19 S. R., 845.

If he is a trespasser, *without malice,* yet he is liable

to all damages directly consequent from the levy of the writ. Under the Florida Statute, the surety covenants to pay the exact amount of damages the attaching creditor is liable, *in the absence of malice.*

Damages Reasonably Contemplated by the Surety When he Covenants to Pay Them.

1st. When it signs the bond, through its local agents, the surety company is chargeable with knowledge that the writ will issue.

2d. He is chargeable with knowledge that the writ will be levied, and as a consequence, the alleged debtor's property *will be seized and taken from his possession.*

3d. In case at bar, the surety is chargeable with knowledge that the plaintiffs were engaged in the manufacture of timber and lumber; that the writs would be levied upon its mill plant, and sufficient timber and lumber and logs to satisfy the amount of the writs, or $85,000; and that all such personal property would be taken from the plaintiff's possession.

4th. The surety was chargeable with knowledge, or notice, that, like any merchant or manufacturing company, plaintiff's logs and manufactured product was his *stock-in-trade*, which was its means, or basis of credit, upon which it relied to do business and continue to buy logs and sell lumber.

5th. It is, therefore, presumed to have contemplated such damages as, upon inquiry, it would have known would ensue, to-wit: damages by the interruption of plaintiff's business and injury to its credit and loss of profits.

6th. No attaching creditor, or his surety, has the right *to contemplate* that a business man, when his stock-in-trade—his very means of continuing in business—is attached and taken from his possession, *has money in bank*, or other property by the use of which

he can continue in business, notwithstanding such attachments.

It is, therefore, submitted that a *prima facie* case, to have the questions of damage by the loss of use of the mill plants, of profits and *injury to credit, reviewed and settled*, is made out.

Cases Showing a Conflict of Authority upon Subjects of Damages from Loss of Use of Property, Loss of Profits and Injury to Credit, from an Attachment.

The following are some of the cases where such damages were allowed:

Flourney vs. Howe, 70 Ala., 308.

Pollock vs. Gantt, 69 Ala., 373.

Hondley vs. Chadwick, 109 Ala., 505.

Birmingham Dry Goods Co. vs. Finley (Ala.), 26 So. Rep., 138.

1st Shinn. on Attachment, 343-344, citing Doll vs. Cooper, 77 Tenn., 576.

22 Fed. Rep., 220.

Myer vs. Sayon, 34 Neb., S. C., 51 N. W.; 753.

Kyd vs. Cook, 56 Neb., 76; 51 N. W., 753.

Lewis vs. Taylor (Texas Civil App.), 24 S. W. Rep., 92.

Houyen vs. Hockmeister (New York Appeals), 21 N. E. 1046.

92 Mich., 258.

92 Ill. App., 606-615.

139 Ill., 109.

1st Sedgwick on Damages, Sec. 127, p. 184.

1st Sutherland on Damages, Sec. 77.

Phehue vs. Royal Bank, 5 L. R. Ex., 92.

Blair vs. Kinch, L. R. Ir., 274.

Elder vs. Kutner, 97 Col., 49.

To the contrary are—

Seattle Crockery Co. vs. Haley, 6 Wash., 302.
8 B. Munroe, 51.
8 B. Munroe, 160.
34 Ark., 707.
19 Mo., 613.
9 Rob. La., 90.
10 Iowa, 349.
18 Fed., 312.
35 Fed., 395.
34 Fed., 474–476.

Two or More Contemporaneous Causes

It was error of the Appellate Court not to reverse the judgment on the ruling of the Circuit Court that there were *three contemporaneous or concurring causes of damages*, to-wit: the attachments, the common-law suits, and refusal to deliver logs after the date of the attachments, and for that reason the trial judge refused to submit to the jury the damages caused by the attachments.

There is no authority for such a ruling. Neither an innocent trespasser, nor a malicious trespasser, can apportion his wrong or damages; and the injured party may sue either one or all of the persons causing damage, where there is more than one.

If defendant sets up that from another cause the injury happened, he must prove that the injury must have happened if his act complained of had not occurred.

Davis vs. Garret, 6 Bing. 716, by Ch. J. Tindall, a case which has been followed in this country.

In Grimes vs. Bowerman, 92 Mich. 258, s. c. 53 N. W. Rep. 751, which was an attachment case, the Court, in the syllabus, said :

"Where the plaintiff has been injured in his per-
"son or property by the wrongful act of the defendant,

"the fact that a third party by his wrong contributed "to the injury does not relieve the defendant from "liability; while the culpable act of a third party may "have been the immediate cause of an injury, an "earlier act of the defendant may have contributed so "effectually to it as to be regarded as the efficient, or "at least concurrent and responsible cause."

That decision states the law on the subject. The earlier act here was the issue of the writ of attachment. Its issue and levy preceded the summons in the common law suit, which was not until October 2nd.

So that the earlier efficient act, *the first blow*, was the attachment and its levy. The contract did not provide for the delivery of logs every day, the effect of not delivering any logs on October 1st, or indeed for that entire month, would not be felt or cause any damage until the three million feet in the boom were sawed up, which took six weeks. As to this, the earlier act was also the attachment and its levy.

A. unlawfully causes B. to be arrested and imprisoned, whereby B. is unable to perform a profitable contract upon which he is engaged. B sues A. to recover damages for such arrest and imprisonment. A. answers and says to B.: You have no right to have that question tried, because at the same time I caused your arrest, I seized and carried away the material you had on hand which it was necessary for you to have in order to perform your contract, and it is so uncertain whether you could have supplied yourself with other necessary material, if you had not been arrested, that the jury can not estimate with any certainty how much damages was caused by the arrest.

A. is killed in a railroad accident. His administrator sues the company for damages. The company answers that A. was suffering from asthma or consumption, or a snake-bite, and might have died in a few days if he had not been killed, consequently he

has no right to have his case against the company *tried at all.*

Such reasoning is fallacious.

In Ring vs. Cohoes, 77 N. Y. 83, s. c. 33 Am. Rep. 574, the Court said: "When several proximate causes "contribute to an accident, and each is an efficient "cause, without the operation of which the accident "would not have happened, it may be attributed to all "or any of the causes." (See 8 Am. & Eng. Enc. of Law, 580 (2nd Ed.), on subject of Several Proximate Causes.)

In Hackett vs. Smelsley, 77 Ill. 110, suit was brought by a wife against a liquor seller for selling liquor to her husband, to recover damages for injury to her means of support caused by the selling of the liquor to her husband. Held: "It will not avail "defendant to prove that others sold liquor that may "have contributed to the husband's intoxication."

"If damage has resulted directly from concurrent "wrongful acts, each of these acts may be counted on "as the wrongful cause, and the parties held responsible "either jointly or severally for the injury." (Cooley on Torts, p. 78, and cases cited.)

In Davis vs. Garrett, 6 Bing. 716, the Court said: "Where a loss has actually happened, *it is not suffi-* "*cient for a defendant to establish that the same loss* "*might have happened, but that it must have happened,* "*if the act complained of had not been done.*" (Cited in Cooley on Torts, bottom of p. 71-72.

In Peck vs. Neil, 3 McLean, 22-24, it was held that defendant was liable if his acts contributed to the injury, though a third party's acts also contributed to the same injury.

In other words, the rule is expressed that it is not necessarry to prove that the acts complained of here, the attachments, were the sole cause of the injury.

Lake vs. Milliken, 62 Me. s. c. 16 Am. Rep. 456, and cases cited.

It can not be doubted that the defendant, by the terms of its bond, is bound to pay all the damages that the attachments directly caused. Such is its covenant. It is even broader than that.

In Lake vs. Milliken, *supra*, the Court says: "When the injury is the result of *two concurring* "*causes, one party is not exempt from full liability*, "although another party was equally culpable," and that in any event it was a question for the jury.

In 6 Bing. *supra*, Ch. J. Tindall says: "Defendant "can not apportion his own wrong, and defendant "must establish that the injury must have happened "but for the act complained of."

If all the alleged contributing causes were each approximate causes, "and each being an efficient "cause, without the operation of which the injury "could not have happened," the injury may be attributed to all or any of the causes. (8 Am. & Eng. Enc. of Law (2nd Ed.) pp. 580-581; sub-div. (g) and cases cited.)

But it is obvious that neither the common law suits nor the refusal to deliver logs was an efficient proximate cause, without which the damages would not have happened. It is absurd as a matter of fact, and certainly the Court can not assume as a matter of fact that the asserted contributory causes would have caused the destruction of plaintiff's business, if the attachments had not been issued and levied.

The following are cases where it was held that contributing causes do not defeat the right to recover full damages for the cause complained of:

Myers vs. Malcolm, 6 Hill 292;

Chacey vs. Fargo, 5 N. Dak. 173.

If these common law suits and refusal to deliver logs had been acts of third parties, it is well settled that such acts would not defeat the recovery for full damages caused by The Atlantic Lumber Company, or its surety, the defendant.

True, the defendant's covenant is to pay the damages caused by the attachment. To hold that where it is obvious the attachment did cause serious damages, and that because other even concurrent causes may have contributed to the same damages, there can be no recovery, would be a denial of justice.

The laws of Florida contemplate and provide for writs of attachment in a pending suit, but the statute requiring the bond does not contemplate, nor is it a fact, that the pendency of the suit itself causes any injury that can be considered to reduce the damages caused by the attachment.

We think the contrary contention was never before made in any State.

In such case, the third parties and The Atlantic Lumber Company would be liable jointly or severally. It is so expressly held in :

Barrett vs. Railroad Company, 45 N. Y. 628;

Webster vs. Railroad Company; 38 N. Y. 260.

In the latter case it was distinctly *held a refusal to charge* that if the acts of a third party contributed to the damages plaintiff could not recover, *is not error.*

That rule of law being applicable to a case of contemporaneous contributory negligence, how much greater is the reason for applying it to the case at bar, *where the acts of The Atlantic Lumber Company were voluntary and deliberate, in suing out the attachments,* and defendant's becoming a surety was also voluntary.

To the same effect is Burrows vs. March Gas. Co. L. R. 5 Exch. 67; Pastene vs. Adams, 49 Cal. 87.

Nothing can be shown in an action on the bond as a defense except the truth of the existence of the grounds upon which it issued.

Lobenstein vs. Hymson, 90 Tenn. 606; s. c. 18 S. W. Rep. 250;

Drummond vs. Stewart, 8 Iowa 341.

The surety is as much responsible as to actual damages for "*setting-a-going*" the proceeding as is the

attaching creditor. (1 Shinn on Attachment, p. 329, citing 49 Mo., p. 25.)

No man or corporation ever went on attachment bonds for $85,000 without being fully advised of the nature of the attaching creditor's claims, and risks taken.

The Supreme Court of Alabama had this subject before it in Louisville Railroad Company vs. Jones (1888), where in a suit by Jones for damages for personal injuries by defendant's negligence, the railroad company set up that plaintiff at the time of the accident *had pneumonia, which contributed to plaintiff's death.* Held: that the company must establish that he *must have* died from the disease, not *may have.*

Id., 3 Sou. Rep., 902-904, and notes, it was also held that it was a question for the jury.

In Beauchamp vs. The Mining Company, 15 N. W. 65 (Mich.), where a similar defense was set up, it was held: that death must be referred to the cause complained of unless it be shown that death must have resulted if the act complained of had not occurred.

It was for the jury to decide whether the other so-called causes so infected plaintiff's business with disease that it would have ceased to do business if the other injury—the attachments—had not happened.

In Beauchamp vs. Saginaw Company, 15 N. W. Rep., 65 (Mich.), the Supreme Court of Michigan quoted approvingly from Baltimore Railroad vs. Reaney, 41 Md., 117, as follows:

"But it is equally true that no wrong-doer ought "to be allowed to apportion or qualify his wrong, and "that as a loss has actually happened while his own "wrongful act was in force and operation, he cannot "be permitted to set up as a defense that there was a "*more immediate cause of the loss,* if that cause was "in operation by his own wrongful act. To entitle "such a party to exemption, he must show not only "that the same loss might have happened, but that it

"must have happened if the act complained of had not "been done." (Citing Davis vs. Garrett, 6 Bing., 716.)

The Supreme Court of Michigan further said in that case:

"If the injury received and the sickness following "concurred in and contributed to the attack of pneu- "monia, the defendant must be held responsible there- "for. It cannot be said that there was a wrongful "second act or a disease wholly independent of the "first wrong which caused the death of the boy." (Citing People vs. Cook, 39 Mich., 239.)

To like effect is Railroad Company vs. Kemp, 43 Am. Rep., 134 (Md.)

Now, we submit that the question whether one would have died from pneumonia if he had not been injured in an accident is more replete with uncertainties, and a more difficult question for a jury to decide, than whether plaintiff, with the property and assets it owned and credit it enjoyed prior to the attachment, it being then a going and flourishing concern, would have been able to obtain a full or partial supply of logs and continued in businesss.

For the above reasons, and those stated in the Petition, it is submitted that the Court should allow the petitioner to assign errors claimed to be to its prejudice.

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